Supreme Court, U. S.
FILED
MAY 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1719

DONALD R. CARLYLE, WILLIAM BRADFORD WATTS and
BERNARD P. REID,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

APOIAN, ROSS & FUNK, P.C.
110 North Main Street
East St. Louis, Illinois 62201
Telephone (618) 875-6900
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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**To the United States Court of Appeals
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Petitioners, DONALD R. CARLYLE, WILLIAM BRADFORD WATTS and BERNARD P. REID, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on the above-captioned cause on January 16, 1976; petition for rehearing en banc being denied on April 27, 1976.

CITATIONS TO OPINIONS BELOW

Petitioner, DONALD R. CARLYLE, was convicted of five substantive offenses and one count of conspiracy in a jury trial before the Honorable Judge Robert Morgan on October 17, 1974 in the United States District Court for the Southern District of Illinois, Alton Division, No. A-CR-74-12. Petitioner was sentenced to 13 years in prison on December 10, 1974.

Petitioner, WILLIAM BRADFORD WATTS, was convicted of 4 substantive offenses and one count of conspiracy in a jury trial before the Honorable Judge Robert Morgan on October 17, 1974 in the United States District Court for the Southern District of Illinois, Alton Division, No. A-CR-74-12. Petitioner was sentenced to 13 years in prison on December 10, 1974.

Petitioner, BERNARD P. REID, was convicted of 2 substantive offenses and one count of conspiracy in a jury trial before the Honorable Judge Robert Morgan on October 17, 1974 in the United States District Court for the Southern District of Illinois, Alton Division, No. A-CR-74-12. Petitioner was sentenced to 13 years in prison on December 10, 1974.

JURISDICTION

The judgment that is sought to be reviewed is the final order issued in the United States Court of Appeals for the Seventh Circuit on January 16, 1976, at which time the Appellate Court affirmed the trial court's conviction of the petitioners. A copy of this order is attached hereto at page A-1 of the Appendix.

On April 27, 1976, the United States Court of Appeals for the Seventh Circuit denied petitioner's motion for reconsideration and rehearing and suggestion that the rehearing be held en banc.

A copy of this order is attached hereto at page A-15 of the Appendix. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioners, REID and WATTS, assert that the use of electronic surveillance and the information obtained therefrom violated their Fourth Amendment rights of privacy. Further, petitioners, REID and WATTS, had a "reasonable expectation of privacy" regarding said conversations and were also "aggrieved persons" under 18 U.S.C. 2510(11).

2. Petitioners, CARYLYE, WATTS and REID, were denied due process by the denial of their motions for severance and, in addition, were prejudiced by the District Court's refusal to give a multiple conspiracy instruction.

3. Petitioners, CARLYLE, WATTS and REID, assert that the District Court prejudicially erred in accepting an improper reasonable doubt instruction which equated reasonable doubt with substantial doubt.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The United States Constitution, Amendment Four.

18 United States Code 2510(11).

18 United States Code 2511.

18 United States Code 2518(8) (See Appendix).

STATEMENT

The petitioners, DONALD R. CARLYLE, WILLIAM BRADFORD WATTS and BERNARD P. REID, were among 10 defendants charged in a joint indictment which alleged one count of conspiracy against all of the defendants—18 United States Code 371—and 57 substantive offense counts.

Petitioner, CARLYLE, was convicted of 5 substantive offenses (Counts 13, 52, 53, 54 and 59) and Count I of the Conspiracy offense.

Petitioner, WATTS, was convicted of 4 substantive offenses (Counts 19, 24, 28 and 29) and Count I of the Conspiracy offense.

Petitioner, REID, was convicted of 2 substantive offenses (Counts 28 and 29) and Count I of the Conspiracy offense.

All three petitioners were sentenced on December 10, 1974 and each received a total of 13 years imprisonment. A timely appeal was taken to the United States Court of Appeals for the Seventh Circuit where, on January 16, 1976, said Appeals Court affirmed the decision of the District Court. Petitioners' motion for reconsideration and rehearing and suggestion that said rehearing be held en banc was denied on April 27, 1976.

REASONS FOR GRANTING THE WRIT

I

The United States Court of Appeals' Affirmance of the Trial Court's Decision Not to Suppress the Fruits of the Illegal Electronic Surveillance Which Violated 18 U.S.C., Sections 2511 and 2518(8), or to Find the Petitioners, REID and WATTS, Aggrieved Parties Within the Meaning of 18 United States Code 2510(11), Deprived the Petitioners of Due Process of Law.

Prior to the trial, it was learned that the Terminal Railroad police had engaged in extensive electronic surveillance in which conversations between and among several of the defendants had been intercepted. Throughout the instant case, the Government continually agreed that the wire-tapping of the Terminal Railroad Company phones and recording of certain conversations in Company automobiles was a violation of 18 United States Code 2511. Not only was no search warrant issued, permitting the interception of the monitored conversations, but, in addition, all tapes of the unlawfully monitored conversations were *intentionally* destroyed as a result of the illegality involved. The duration of the wire-tap was unclear and unknown. It was known that special agents of the F.B.I. were consulted regarding the legality of these interceptions. Information in the form of notes and tapes were given to this Agency. Tapes were actually played for the Government agents. Various accounts of leads, suspects and other information were communicated to the Government. Yet, no action was taken by the Government to preserve these tapes, notes, memoranda and statements of relevant conversations or to preserve their existence before such time as they were destroyed. We have no objective or independent verification of what these interceptions contained or how these interceptions were used—all we have is the self-serving testimony of four Government agents and those Terminal officials responsible for the

initial interceptions. The Appeals Court correctly commented that with these stated facts the Government was called upon to meet the ultimate burden of persuasion and show that its case was not the product of the tainted evidence. But, how could the defense counter the Government's proffer of such evidence? By the destruction of the tapes and with only pro-prosecution witnesses available to give their version of what the surveillance revealed and how it was used, the defendants were in an unenviable position. The defendants had an intolerable obstacle in presenting their suppression arguments. The only independent source of information which the Government introduced to demonstrate that this case was purged from the wiretap taint was the testimony of Joel Koen. Mr. Koen's testimony was that of a co-conspirator who first became known to the F.B.I. as a result of an illegal wiretap during a conversation with co-defendant, David Nordstrom. In an attempt to dispel any taint upon the testimony of Joel Koen, an informant testified that he did not know of any illegal wiretaps at the time he made his confession to certain F.B.I. agents, yet, on cross-examination, he admitted that during the interview he was asked very specific information concerning dates, names, and goods that were purportedly stolen. At no time were the sources of such information revealed. The specificity of this knowledge assisted in getting cooperation. (T. 32-33). Yet, the Government offered no evidence to show the specific source of the knowledge they used in their investigations. Clearly, this would be necessary to show the independent source of such knowledge. If the Court strictly scrutinizes the Government's claim of independent source, as required by *United States v. Huss*, 482 F. 2d 38 (2d Circ. 1973), it is far from clear that the wiretap taint was sufficiently attenuated. This difficulty in concluding sufficient attenuation is narrowed to the question of whether the F.B.I. made use of the electronic surveillance in its discovery of Koen and, alternatively, even if Koen was discovered by independent F.B.I. investigation, whether said tapes were used as an extortive device to induce his cooperation. Such are serious questions which the Government never answered and

since the tools to answer such questions were in the Government's hands:

> "To compel the parties who object to the use of evidence obtained as a result of unlawful wire-tapping to go forward with a shelling of the taint, *Alderman v. United States*, 394 U.S. 165, 183, and then to withhold from him the means to meet that burden is to create an absurdity in the law." *United States v. Huss*, supra at 47.

To prevent this absurdity, the burden of proof was upon the Government and the record reveals the burden of demonstrating an independent source was not carried. The disclosure of information as required by 18 U.S.C., Section 2518(8) was never complete nor was it shown to be free of taint.

Petitioners, WATTS and REID, believe that this illegal surveillance was directly prejudicial to their case. The Court should have held that petitioners were aggrieved persons within the meaning of 18 United States Code 2510(11). Since the Government's disclosures were incomplete and inadequate, the petitioners were handcuffed and were unable to actually determine whether they were, in fact, monitored. In addition, petitioners believe that they were aggrieved parties since, being Terminal Railroad employees, they were lawfully upon the premises and held the status of invitees. The petitioners had a privacy interest since they, as business invitees, were regular users of the Terminal Railroad phone. *United States v. Ramsey*, 503 F. 2d 524, 532 (7th Circ. 1974); Cert. Denied 420 U.S. 932 (1975).

The United States Court of Appeals' affirmance of the District Court decision not to suppress the fruits of the illegal electronic surveillance presents a substantial and significant question concerning the construction and effect of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.,

Sect. 2511, et seq. Congress, in passing Title 3 of 18 U.S.C. 2511, et seq., recognized that:

> "The tremendous scientific and technological developments that have taken place in the last Century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance." *United States Code Congressional & Administrative News*, 90th Congress, 2nd Session, pages 2112, 2154.

In the instant case, the electronic eavesdropping was flagrant, gross and patently improper. The existence of this illegality was known to the Government and no steps were taken to preserve or protect the resultant information that was received from the eavesdropping. In the instant case, the Title 3 safeguards, to allay the fears of what law enforcement surveillance could become, were cast out the window. None of the Title 3 safeguards were followed. This court is now called upon to refortify and explicitly delineate those safeguards. Neither this Court nor any other Federal Court has ever been called upon to decide the legality of the introduction of the fruits of a total patent and gross violation of the Omnibus Crime Control and Safe Streets Act. Petitioners submit their case presents an excellent opportunity to give full meaning to the protections Congress intended Title 3 of this Act to have.

In addition, the instant case presents a substantial question to be decided before this Court since it involves a conflict among the 2nd, 6th and 7th Circuits. In the *United States v. Huss*, 482 F. 2d 38 (2d Circ. 1973), illegal tapes of monitored conversations were destroyed and no transcripts were made therefrom. There, the Government turned over a summary of logs. Still, the Court, in determining that Title 3 of the Act had been violated, felt compelled to dismiss the action

concerning one of the defendants, Sheldon Seigel. In the instant case, not even logs or summaries of the intercepted communication were given to the petitioners. Similarly, in the *United States v. Giordano*, 440 F 2d 449 (6th Circ. 1971), all tapes of an unlawfully monitored conversation had been lost. The defendants were thereafter furnished with an F.B.I. log of the conversations. There, the Court of Appeals found that it was necessary to remand since the Government had not shown that only logs were available to thus meet the disclosure requirements of *Alderman v. United States*, 394 U.S. 165 (1967). In the instant case, more than logs were shown to have been received by the Government. The web of communications and interceptions is so complex and unrevealed as to require dismissal of these charges against the petitioners. Only such an interpretation of Title 3 of the Omnibus Crime Control and Safe Streets Act would withstand the Constitutional dictates of the Fourth Amendment to the United States Constitution.

II

Although the Petitioners, DONALD R. CARLYLE, WILLIAM B. WATTS and BERNARD P. REID, Were All Charged With the Same Conspiracy, in Fact, the Record Established That Multiple Conspiracies Existed and, as Such, the District Court Erred in Failing to Grant the Petitioners' Motions for Severance and Further Erred in Not Instructing the Jury in Regard to the Multiple Conspiracies.

The District Court ruled that petitioners' due process rights were not compromised by the denial of their motions for severance in that there was an insufficient showing of prejudice by reason of the joint trial. However, a critical examination of the instant record will show that a sizeable portion of the evidence was totally irrelevant to the petitioners, CARLYLE, WATTS and

REID. It was this damaging, yet irrelevant evidence which was received and considered by the jury. Such a situation was permitted to exist by the very reason of the improper prejudicial joinder of 10 defendants and 58 counts, including a conspiracy count alleging 53 overt acts. Of the approximate 100 witnesses who were called by the Government, only a small number testified against the appellants.

The petitioners respectfully submit to this Court's attention the recent case of *United States v. Bertolotti*, 75-1107 (2d Circ. 11-10-75) in which the 2nd Circuit ruled that while the indictment charged a single conspiracy, the evidence adduced at trial demonstrated at least 4 conspiracies, which were lumped together in the interest of convenience. This situation warranted reversal, as does the situation of the instant case. Here, there was no evidence of a scheme or overall agreement or plan.

Due to the complicated nature of this case—evidenced by the large number of witnesses and exhibits—the petitioners were confounded in their defense. This situation was conducive to confusion. After having failed in their severance attempts, petitioners attempted to salvage what they could of their defense by requesting a multiple conspiracy instruction consistent with *United States v. Kotteakos*, 328 U.S. 750 (1945). The Appellate Court held that the District Court's refusal to give the *Kotteakos* instruction was not error since the evidence "when viewed in the light most favorable to the Government, together with all reasonable inferences flowing therefrom, permitted the jury to conclude, as it did, that there was a single over-all conspiracy and that each defendant was a participating member of it at some point in its duration." The District Court and the Appellate Court thereby misplaced the burden of proof in that there was also evidence to support a multiple conspiracy theory and the jury should have been given the alternative of so finding.

III

In Giving the Reasonable Doubt Instruction, the District Court Erred by Equating Reasonable Doubt With Substantial Doubt.

The use of the LaBuy 6.01-3 instruction placed an unconstitutional burden upon the petitioners, CARLYLE, WATTS and REID to prove their own innocence. Even the Appellate Court noted that had the decision of *United States v. Gratton*, 75-1232 (7th Cir. 11-6-75) been available to the District Court at the time of trial, the panel would be required to reverse because of the improper reasonable doubt instruction (See Footnote 2 of the Appellate Court decision). However, the Appellate Court failed to note that *United States v. Bridges*, 499 F. 2d 179, 186 (7th Circ. 1974) was in existence at the time of trial and that *Gratton* was merely a reaffirmance of *Bridges*. *Bridges* was not only available at the time of trial but was specifically cited to the District Court as well. This instruction, even examined as a whole, was the final blow to the petitioners' efforts to salvage a fair trial—this instruction was the finale of a litany of abuses which deprived the petitioners of their constitutional rights to a fair and impartial trial.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted, and, in addition, due to the inter-relationship of the defenses and the issues involved in this conspiracy trial, petitioners, DONALD R. CARLYLE, WILLIAM BRADFORD WATTS and BERNARD P. REID, request that any issues raised by their co-defendants in their petitions for writ of certiorari be made applicable to this petition and incorporated herein.

Respectfully submitted

APOIAN, ROSS & FUNK, P.C.
Attorneys for Petitioners
Donald R. Carlyle, William Bradford
Watts and Bernard P. Reid

APPENDIX

In the United States Court of Appeals
for the Seventh Circuit

Nos. 74-2057 through 74-2066

United States of America,

Plaintiff-Appellee,

v.

Teddy R. Crouch, Donald R. Carlyle, William T. Ryan, Glenn A. Frederick, Thomas Reyes, a/k/a Pancho, David M. Nordstrom, Willie Albert Mize, William Bradford Watts, Bernard P. Reid, and William Evans,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Illinois, Alton Division

No. A-CR-74-12

Robert D. Morgan, *Judge*

Argued June 11, 1975—Decided January 16, 1976

Before Clark, *Associate Justice* (Retired),* Stevens, *Circuit Justice*,** and Grant, *Senior District Judge*.***

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

*** Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

Grant, *Senior District Judge*. The appellants were charged in a 58-count indictment which alleged one count of conspiracy against all defendants, in violation of 18 U.S.C. § 371, and 57 counts of substantive offenses, in violation of 18 U.S.C. §§ 659 and 2. Each defendant was not charged in each substantive count; some defendants were charged with as many as 18 substantive counts, while others were charged with only two. All charges related to the theft and disposition of property being transported as interstate freight through the Terminal Railroad Yards in Madison, Illinois, during a period from May 1, 1971, through October 12, 1973. After trial, all defendants were convicted of the conspiracy count, and all defendants were convicted of at least one of the substantive counts in which they were named. The appellants received sentences ranging from a maximum of 22 years to a minimum of four years.

Appellants have now instituted the present appeal in which they challenge their convictions in the court below. In support of their appeal, appellants have raised a myriad of issues for this Court's consideration. This Court has embarked upon extensive review of all of the issues raised by appellants in their briefs and in oral argument. However, because we are convinced, on the basis of the record, that many of the issues herein presented are clearly without merit, this opinion will discuss only those matters which have impressed the panel as being substantial enough to require extensive treatment. Having considered all of the issues presented, and for the reasons stated below, we affirm the convictions of the appellants in the district court.

I—ELECTRONIC SURVEILLANCE

Prior to trial, it was learned that the Terminal Railroad Police at the Madison Yard had engaged in extensive electronic surveillance in which conversations between and among several of these defendants had been intercepted. The district court held

a two-day hearing on defendants' several motions to produce and to suppress the fruits of that surveillance. It developed during that hearing that, although no true logs were kept to monitor the three yard office extensions, a piece of paper was kept at each of the three extensions on which notes were made by the persons who used the monitor, one of which was William S. Wagner, then Chief of Police for the Terminal Railroad Association. Unfortunately, all tapes and notes were subsequently destroyed by Chief Wagner prior to his retirement in late 1973. At the conclusion of the hearing, the court below denied defendants' motions to suppress. In this appeal, appellants contend that the district court erred in so ruling because the government's disclosure of the information obtained by the wiretap was grossly inadequate and in violation of 18 U.S.C. § 2518 (8)(a), which reads, in pertinent part, that: "The contents of any wire or oral communication intercepted . . . shall, if possible, be recorded on tape or wire or other comparable device. * * * They shall not be destroyed except upon an order of the issuing or denying judge . . ." Based on the destruction of the material which occurred herein, appellants argue that there has been a total failure to comply with the provisions of the above statute.

Appellants further argue that the court below erred in failing to find that all defendants were "aggrieved persons" under 18 U.S.C. § 2510(11). In any event, appellants maintain that in the instant case the electronic surveillance upon them violated their reasonable expectation of privacy under the Fourth Amendment to the Constitution.

In response to these claims, the appellee, although conceding that there were irregularities involved as to the surveillance, nonetheless maintains that it met its initial disclosure obligation by means of written disclosures and by making certain witnesses available for examination by defendants, thereby affording defendants the opportunity to develop any indication of taint that might have existed. Further, appellee contends that appellants

herein failed to meet their burden of showing that a substantial portion of the case against them was tainted. In any event, appellee argues that the evidence which it adduced, even if taint was demonstrated, was derived from a legitimate independent source; and finally, that any existing taint was sufficiently attenuated when witness Joel Koen made a free and voluntary choice to cooperate with the government in its prosecution of the case. It is argued, then, that the court below properly ruled that the illegal surveillance by the Railroad Police did not require suppression.

We turn initially to a discussion of the ramifications of 18 U.S.C. § 2518(8)(a). As noted earlier, it would appear that the underlying purpose of the statute is to insure an adequate disclosure of the contents of any and all intercepted communications. *Alderman v. United States*, 394 U.S. 165, 183 (1967). In this regard, it has been held that where the tapes of monitored conversations have been destroyed, substitutes (such as logs) have been found to be sufficient under certain circumstances. *United States v. Giordano*, 440 F.2d 449, 451 (6th Cir. 1971). We must keep in mind, nevertheless, that where, as here, there has been a destruction of evidence, the interest of fair play demands that it must not be impossible for a defendant to carry his burden of demonstrating taint at the taint hearing. Accordingly, we are compelled herein to "strictly scrutinize the government's claim of independent source." *United States v. Huss*, 482 F.2d 38, 48 (2d Cir. 1973). As noted in *Alderman, supra*, 394 U.S. at 183, although petitioners must initially go forward with specific evidence demonstrating taint, the United States in a case where (as here) an illegal search is involved, has the ultimate burden of persuasion to show that its evidence is untainted. This leaves ample opportunity to the government to convince the trial court that its proof had an independent origin.

Although we do not condone the activity of the private railroad police in the destruction of the material pertaining to the monitored conversations, we are convinced, first of all, that

even though said material was destroyed, the record herein adequately demonstrates, and the district court so found in its "informed discretion, good sense, and fairness"[1] that, under the particular circumstances of this case, the government met its disclosure obligations under *Alderman and Giordano, supra*, and *United States v. Balistrieri*, 436 F.2d 1212 (7th Cir. 1971); cert. denied, 402 U.S. 953 (1971). Initially, we note that at the two-day evidentiary hearing on the electronic surveillance issue, the government made available for examination some eleven witnesses who had some connection—in some instances, even personal knowledge—with respect to the surveillance that took place within the Madison Yard complex during the time period in question. These witnesses included two F.B.I. agents who participated in the investigation of the electronic surveillance, the F.B.I. agent in this case, as well as two undercover agents who had been instrumental in developing evidence in the case. Also available for examination by defendants were the three persons who used the monitor, Inspector James Lockett, Lt. James Davis, and Chief Wagner. Under these circumstances, although the defendants admittedly lacked the benefit of tapes and/or memoranda upon which to attack the nature of the surveillance which was conducted, we conclude that the availability of these witnesses afforded the defendants sufficient information as to the character and totality of the surveillance involved herein so that they might be able to go forward to show taint. Needless to say, we are not convinced that defendants met their burden in this regard. Nevertheless, as noted above, in such a situation it was then incumbent upon the government to meet the ultimate burden of persuasion and show that its evidence was untainted. *Alderman, supra*, 394 U.S. at 183. This burden which devolved upon the government, we believe, was satisfied when appellee demonstrated that it obtained its basic evidence from the witness Joel Koen—who, as an eyewitness to the events that transpired herein, made a voluntary choice to

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[1] *See Nardone v. United States*, 308 U.S. 338, 341-342 (1939).

divulge much of the information upon which the government's case rested. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963); United States v. Marder, 474 F.2d 1192, 1196 (5th Cir. 1973); United States v. Hoffman, 385 F.2d 501, 504 (7th Cir. 1967). Further, we have no doubt that the potential of Koen as a witness and/or defendant was not learned solely from the overheard conversations. Rather, it is totally consistent in the record that information as to the significance of Koen as a witness was discovered through the efforts of F.B.I. Agent David True who, it appears, had no knowledge of the wiretap, during his investigation of and direct contact with many defendants, including Ronald Ridgeway and William Ryan. Accordingly, since it is apparent that the government's source of information was indeed wholly independent of the illegal surveillance, it is clear that any alleged taint was completely attenuated thereby. *Nardone, supra*, 308 U.S. at 341.

As to the appellants' argument that the court below failed to find that all defendants were "aggrieved persons" under 18 U.S.C. § 2510 (11), we note that the trial court found that only defendants Nordstrom, Frederick, and possibly Ryan were aggrieved parties and that the other seven defendants lacked standing to seek suppression. We need not tarry long over this issue, however, in light of our conclusion immediately above that suppression was not required under the circumstances of the instant case. Accordingly, the question of whether or not the district court correctly determined that three of the defendants had standing and seven of them did not need not be addressed by the panel at this juncture.

II—INSTRUCTION ON REASONABLE DOUBT

When the court below gave its charge to the jury, it included the following instruction on burden of proof and reasonable doubt:

A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt. The burden of proving defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on cross-examination of witnesses for the government. If the government fails to prove defendant guilty beyond a reasonable doubt the jury must acquit him.

A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his or her life.

The defendants timely challenged the giving of this instruction, grounding their objection on the court's attempt to define reasonable doubt, and in particular, the equating of reasonable doubt with substantial doubt. The government responds by contending that the instruction given by the court, which was taken directly from LaBuy, *Jury Instructions in Federal Criminal Cases* § 6.01-3, instead of equating reasonable doubt with substantial doubt, equates reasonable doubt with a doubt based on reason. In any event, appellee argues that the court's instruction, taken as a whole, properly conveyed to the jury the concept of reasonable doubt.

This Court, as of recent months, has engaged in a thorough review of the propriety and impropriety of instructions which attempt to define the term reasonable doubt and the language used therein. In *United States v. Bridges*, 499 F.2d 179, 186 (7th Cir. 1974), for example, we stated that the equating of reasonable doubt with substantial doubt is objectionable. More recently, in *United States v. Gratton*, No. 75-1232 (7th Cir.

Nov. 6, 1975), where the trial court gave the challenged LaBuy instruction, we reaffirmed our position as stated in *Bridges, supra*. However, in *Gratton*, we failed to find plain error in the absence of an objection under F.R. Crim.P. 30. Finally, in what is probably our most extensive discussion on the question, we gave our approval to the form of the instruction which was used in the instant case (minus the "two hypothesis" portion) in the case of *United States v. Shaffner*, No. 75-1324 (7th Cir. Oct. 28, 1975). In *Shaffner*, after noting our approval of that portion of the instruction which had been given by the trial court, we reaffirmed our adherence to the general proposition that reviewing courts will not reverse where the instruction considered as a whole is not prejudicially erroneous.

In regard to the instant case, although we recognize the objectionable nature of the particular portion of the instruction which refers to reasonable doubt and substantial doubt, we are not prepared to say, in light of the instruction considered as a whole, that reversible error was committed. As we stated in *Shaffner, supra*, "considering the instruction as a whole, we do not think that the defendant's rights to be presumed innocent, to remain silent, and to have the government bear its burden of proof were violated." We are of the opinion that that same rule is applicable here.[2]

III—CONSPIRACY

Appellants contend that there existed in the instant case not one scheme or conspiracy, but a multitude of separate con-

[2] Although we want to make it clear that the language incorporated into the reasonable doubt instruction in the instant case is indeed suspect and definitely not preferred, it should be noted that when the court below gave the instruction in question to the jury in this case, it did not have the benefit of this Court's decision in *Gratton, supra*, or the reasoning therein. Had this Court's decision in *Gratton* been available for the trial court's consideration, it would be necessary to exercise our supervisory power and decide otherwise.

spiracies; and that, because of the existence of this host of conspiracies, it was error for the trial court to deny their motions for severance. Further, appellants argue that because of the multitude of conspiracies that allegedly existed, the court below was in error in submitting the conspiracy issue to the jury on a single conspiracy instruction. For these reasons, it is argued by appellants that they did not receive a fair trial.

On the other hand, appellee claims that the evidence established that all of the appellants herein were members of a large-scale, open-ended conspiracy to steal from shipments passing through the Terminal Railroad Association and thereafter to "fence" said merchandise. In this regard, it is argued that each defendant was a member of the overall conspiracy at some point in time during its existence and that the defendants worked together in a variety of combinations and roles, the only reasonable inference being that all of them shared in a common plan or design. Accordingly, this Court is urged to affirm the trial court's denial of appellants' motions for severance as well as the trial court's decision not to instruct the jury on multiple conspiracies.

As to the question of severance, it is clear that severance should not be granted except for the most cogent reasons. *United States v. Kahn*, 381 F.2d 824, 838 (7th Cir. 1967); cert. denied, 389 U.S. 1015 (1967); reh. denied, 392 U.S. 948 (1968). One of the most, if not the most, compelling factors in favor of granting severance is if the moving party shows prejudice—that is, that he will be unable to obtain a fair trial without severance. *United States v. Cervantes*, 466 F.2d 736, 739 (7th Cir. 1972). Absent a strong showing of prejudice, the denial of a motion for severance will not be reversed on appeal. *United States v. Griffin*, 464 F.2d 1352, 1358 (9th Cir. 1972). In the present case, we are unable to conclude, on the basis of our careful review of the record, that any of the appellants was prejudiced by being tried jointly.

Likewise, we fail to agree with appellants' argument that they were substantially prejudiced by the district court's failure to give a multiple conspiracy instruction. It is clear to this panel that the evidence, when viewed in the light most favorable to the government, together with all the reasonable inferences flowing therefrom, permitted the jury to conclude, as it did, that there was a single, overall conspiracy and that each defendant was a participating member of it at some point in its duration. *United States v. Santana*, 503 F.2d 710, 715 (2d Cir. 1974); *Glasser v. United States*, 315 U.S. 60, 80 (1942). Therefore, we decline to find error or that appellants did not receive a fair trial when the district court denied their motions for severance and when the court below refused to give a multiple conspiracy instruction to the jury.

IV—IMMUNITY OF JOEL HARDY KOEN

Appellants assert that the district court committed reversible error in refusing to grant their motion for mistrial when: (1) the government permitted the witness Koen to take the stand with knowledge that he would invoke his Fifth Amendment privilege; and (2) when the court and the prosecutor commented to the jury regarding the immunity which had been granted to the witness. It is argued that the comments made as to Koen's immunity served only to enhance his credibility in the eyes of the jury and thus resulted in substantial prejudice. Additionally, in a related argument, appellants maintain that the trial court unduly restricted the cross-examination of Joel Koen on the question of his immunity and as to various other subjects concerning his credibility.

In response, appellee contends that there was no flagrant attempt by the prosecution herein to bolster its case as a result of Koen's invocation of the privilege, nor were there any impermissible inferences that could have been drawn therefrom which

might have added critical weight to the government's case. It is further asserted by appellee that the court's comments to the jury as to Koen's grant of immunity merely served to enhance their understanding of an otherwise difficult concept. Such comment could not possibly, appellee argues, have resulted in any prejudice against appellants. Additionally, the government contends that its own remarks as to Koen's immunity, which were made in rebuttal to defendants' closing remarks, were merely an invited response to, and fair comment upon, a matter which had already been raised and focused upon by defendants' counsel in their closing statements to the jury. Finally, appellee contends that the district court, in its discretion, properly controlled the extent of Koen's cross-examination, as well as the cross-examination of other witnesses, based on valid considerations of relevancy, materiality, and keeping such examination within the scope of the subjects covered on direct examination.

As to appellants' first contention—that of prosecutorial misconduct—we have carefully viewed the record and fail to find therein evidence of a conscious and flagrant attempt on the part of appellee to build its case out of the inferences arising from the use of the testimonial privilege. Moreover, we cannot find any indication that any impermissible inferences could have been drawn from the fact that Koen invoked his testimonial privilege since the witness took the stand, testified, and was the subject of rather extensive cross-examination. *United States v. Puntillo*, 440 F.2d 540, 543 (7th Cir. 1971).

With respect to the trial court's comments to the jury on Koen's grant of immunity and appellants' claim that said comment simply compounded an already prejudicial situation, we note that the court below made the following explanation:

> Ladies and gentlemen of the Jury, I feel constrained to make a statement to you. As you will recall on yesterday when this witness was placed on the stand, he exercised his

constitutional right under the Fifth Amendment and declined to answer questions. Pursuant to a statute, adopted by the Congress of the United States, the United States Attorney is authorized, upon approval provided by law, to request that a witness be granted immunity from prosecution arising directly or indirectly from answers that he gives after exercising his rights under the Fifth Amendment.

Such a petition was filed yesterday out of the presence of the Jury. The Court considered the petition before this court and granted the petition.

At the request of counsel for the defendants at that time, after conferring together, the court agreed to make no statement to the Jury about the matter at their request, and the court did not at that time for that reason.

> The court did state to counsel at that time, however, that if they made reference to it in cross-examination the court would make this statement to the Jury, which I have just done.

This explanation was made only after the trial court had indicated to counsel, outside the presence of the jury, that such a statement would be made if the issue of immunity was raised on cross-examination, which it eventaully was. We fail to conclude, on the basis of our review of the record herein, that the court's comments to the jury in regard to Koen imparted the slightest indication to the jury that the court was somehow giving its approval to or enhancing the credibility of Koen's testimony. Nor are we convinced that said comments gave the jury the impression that the court was playing the role of an advocate for the prosecution. In any event, if, by some stretch of the imagination, the conclusion could be drawn that the trial court's comments were in any way inappropriate, any significance that may have been attached thereto was dissipated in light of the court's instructions on the care to be exercised by the jury in weighing

accomplice and informer testimony and, additionally, the court's final instructions to the jury that "if during the trial, the Court has intimated any opinion as to the facts, the jury is not bound by that opinion."

Likewise, as to certain remarks regarding immunity which were made by the United States Attorney in rebuttal argument, we find that those remarks amounted to nothing more than fair comment upon, and a response to, a matter which counsel for appellants had raised on several occasions in closing argument. Accordingly, based on the circumstances of the instant case, appellants' position herein as to the impropriety of the statements made by the prosecutor in response to their own closing argument indeed, in our opinion, is virtually devoid of merit.

Finally, we address ourselves to appellants' claim that the district court unduly restricted the cross-examination of Joel Koen as to his immunity and other matters pertaining to his credibility. In this regard, we need only say that the trial court did not, in its sound discretion, violate or unduly interfere with appellants' right to conduct a full and reasonable cross-examination as to the subjects brought out on direct examination. *Alford v. United States*, 282 U.S. 687, 694 (1931). One need only refer to the transcript herein which recounts the length and content of the cross-examination of Koen to realize that appellants were in no significant way curtailed in their examination of Koen or any other witness in the case.

V—REMAINING ISSUES

The remaining issues which have been raised by appellants in this appeal, and which have not been discussed up to this point, include the following: (1) the admission of hearsay evidence and the court's instruction to the jury regarding its use; (2) the court's supervision of peremptory challenges; (3) the

court's supervision of the voir dire examination; (4) the court's admission into evidence of certain exhibits, particularly government's Exhibits 2A-26A and a map contained in government's Exhibit 1D; (5) the trial judge's demeanor in conducting the trial, and his attitude toward counsel; (6) the trial court's instruction to the jury as to separate verdicts and the forms of verdicts used by the jury; and (7) the trial court's sentencing of defendants.

We have scrutinized the above issues and the law applicable thereto with the utmost care and diligence. Nevertheless, having done so, we are of the firm conviction that none of them, in the context of the circumstances and facts of the instant case, is substantial enough to require this Court to embark upon an exhaustive analysis thereof. Accordingly, in the interests of reason and judicial economy, yet not at the expense of a just determination of this appeal, it is the considered judgment of this panel that we need not at this time make separate determinations as to each and every issue alluded to above. In short, we decline to expand this opinion any further with a discussion of matters which we feel would result in mere surplusage.

The judgments of conviction in the district court are now and hereby Affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 27, 1976

Before

Hon. Tom C. Clark, Associate Justice*
Hon. John Paul Stevens, Circuit Justice**
Hon. Robert A. Grant, Sr. District Judge***

United States of America, Plaintiff-Appellee, Nos. 74-2058, 74-2064 and 74-2065 vs. Donald R. Carlyle, William Bradford Watts, Bernard P. Reid, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Illinois, Alton Division. (A Cr 74 12) Morgan, Judge

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for rehearing in the above-entitled cause be, and the same is hereby, Denied.

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

*** Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

18 USC § 2510

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business

and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication commo· carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 112.

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18 USC § 2511

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications

Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral

communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213.

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18 USC § 2518(8)

§ 2518. Procedure for interception of wire or oral communications

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

U. S. CONSTITUTION

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
